In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

With respect to the major issues in this case, neither the briefs for appellees nor the *amicus curiae* brief for the National Association of Criminal Defense Lawyers raise points which we believe require reply. Our original brief presents our position (a) that the Sixth Amendment right to a speedy trial is not applicable to time elapsing before arrest or indictment, (b) that the Fifth Amendment right to due process does reach preindictment, prearrest delay if the government intentionally delays prosecution to impair a potential defendant's ability to defend, but does not bar trial and conviction in this case, and (c) that, even if the due process clause reaches some other instances of delay, appellees have not shown, or even

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alleged, facts that would indicate either real and substantial prejudice or unjustifiable government delay.

This reply brief deals with certain arguments of the appellees and *amicus curiae* regarding (1) the appealability of the case to this Court, (2) the coverage of Rule 48(b) of the Federal Rules of Criminal Procedure, and (3) the scope of the right to a speedy trial under the common law of England.

1. Contrary to appellees' argument, Brief for Appellee Marion, pp. 6–9, it is clear that the judgment of the district court was a judgment sustaining a motion in bar within the meaning of former 18 U.S.C. 3731. Appellees do not contend that jeopardy has attached; but they do urge that the judgment below is not a "bar" to future prosecution. The theory of the cases they cite is that at least some dismissals for want of prosecution do not necessarily end the case, the assumption being that if delay is between indictment and trial, the government, after dismissal, may reindict for the same offense and afford a speedy trial. There is no way, however, that the government can cure preindictment delay if that is the basis for dismissal of an indictment, and a judgment of dismissal for such delay thus plainly operates as a bar to further prosecution. In *United States* v. *Ewell*, 383 U.S. 116, the Court unanimously treated a dismissal for failure to grant a speedy trial as a judgment sustaining a motion in bar. Moreover, judgments based on statutes of limitations, identical in effect to the judgment below, are clearly considered judgments sustaining "motions in bar." See, *e.g.*, *United States* v.

Goldman, 277 U.S. 229; *United States* v. *Rabinowich*, 238 U.S. 78; *United States* v. *Weller*, 401 U.S. 254, 260. Not only does the district court's judgment fall squarely within the definition of a judgment sustaining a motion in bar in *United States* v. *Weller*, 401 U.S. 254, 260, it meets even the more limiting requirement of Mr. Justice Stewart's dissenting opinion in *United States* v. *Mersky*, 361 U.S. 431, 457, since it is based on new matter not alleged in the indictment.

That a motion in bar is like a plea of confession and avoidance does not mean, as appellees intimate, that one making such a plea must admit guilt. Such an admission is not made in pleas claiming *autrefois acquit* or raising the statute of limitations, yet these are examples of pleas by way of confession and avoidance. See *United States* v. *Mersky*, 361 U.S. at 457–458 (Stewart, J., dissenting). It is enough that the plea sets up by way of defense a claim that bars conviction whether or not the defendant is guilt. This is precisely the effect of the motion to dismiss made in this case.

2. Appellees contend that the district court's dismissal of the indictment was under Rule 48(b), Fed. R. Crim. P. (Brief for Appellee Marion, pp. 10–11). Appellees' "Motion to Dismiss Indictment for Failure to Afford Speedy Trial" (App. 12–14) is cast in constitutional terms and makes no reference to Rule 48(b); neither in the Memorandum in Support of the Motion (App. 15–21) nor during the proceedings before Judge Hart (App. 22–39), in which the constitutional arguments were developed, did counsel rely on Rule

48(b). When Judge Hart granted appellees' motion to dismiss on the basis that "there has been a lack of speedy prosecution" (App. 39), he was relying on the constitutional grounds advanced by counsel. Had he meant to rely on Rule 48(b) in the absence of any reliance on that rule by counsel, he presumably would have said so.

In any event, as pointed out in our original brief (p. 14, n. 6), that rule has no applicability to this kind of case. It authorizes dismissal when the government has delayed in presenting the charge to a grand jury against a defendant "who has been held to answer to the district court." That phrase has a specific meaning in the Federal Rules of Criminal Procedure; it refers to the action taken by a United States Commissioner with respect to a defendant when the defendant has waived a preliminary examination or the commissioner has determined at a preliminary examination that there is probable cause that an offense has been committed and that the defendant has committed it. Rule 5(c), Fed. R. Crim. P. The part of Rule 48(b) that reaches delay in presenting the charge to the grand jury is designed to protect against unnecessary delay between the time the government formally acts against a defendant by arresting him and bringing him before the commissioner for a preliminary examination and the time of indictment. That part of the Rule has no relevance for cases such as this where the indictment is the first formal action taken against a defendant.

3. The Brief for the National Association of Criminal Defense Lawyers as *amicus curiae* presents a misleading picture of the state of the law at the time the Bill of Rights was adopted. The *amicus* does not deny that there was, and is, no general law of prescription in England, or that convictions were returned as long as thirty-five years after an alleged offense. 2 Stephen, *A History of the Criminal Law of England* 2 (1883). But the *amicus* seeks to construct out of a handful of lower court decisions (Br. 13–15) a rule that time-lapses between offense and formal accusation were generally a basis for dismissing criminal charges. Only one of those cases predates the Bill of Rights. In that case, *Rex* v. *Robinson*, 1 W. Black. 541, 96 Eng. Rep. 313 (K.B. 1765), private persons, who themselves were being prosecuted for bribery, moved for an information against someone they claimed had committed bribery in connection with an election two years earlier. Considering the unexplained time it had taken these "prosecutors" to come forward, the character of the prosecutors, and the improbability that the offense had in fact been committed (since the candidate on whose behalf the bribe was allegedly made was unopposed), the court discharged a rule to show cause. The case turns in large part on the special characteristics of informations, which traditionally had been granted on application as a matter of course, and the decision represents the court's refusal to carry forward an ap-

parently malicious and ill-founded private prosecution.

Regina v. *Robins*, 1 Cox's C.C. 114 (Somerset Winter Assizes, 1844), which the *amicus* calls the "classic common law statement," is similarly a decision designed to prevent malicious private prosecution. There the private "prosecutor" waited two years before coming forward and claiming to have witnessed the defendant commit the crime of bestiality. The court directed an acquittal because it recognized the severe difficulty of presenting an alibi defense so long after the alleged crime. *Regina* v. *Hext*, 4 Jurist 339 (Bail Court 1840), apparently turns on the fact that at the time the applicant sought a criminal information for an alleged insult, it was clear that there was no likelihood of a breach of the peace resulting from the insult. In *Rex* v. *Marshall and Grantham*, 13 East 322, 104 Eng. Rep. 394 (K.B. 1811), the court declined to enter a rule *nisi* for an information during a term in which defendants would not have time to show cause, but there is no indication that such a rule would not be issued at an earlier stage of a subsequent term.

These cases hardly stand for a general rule that a lapse of time between offense and indictment will result in dismissal of the indictment. At most, they indicate that a prosecution may not be entertained if a private complainant who claims to have witnessed a secret offense unreasonably delays in coming forward. With regard to such offenses, this kind of delay is likely to impair sharply the most effective defense—one based on alibi—and concomitantly, it enhances the

possibility of malicious prosecution or extortion. See Wharton's *Criminal Pleading & Practice,* § 326 (9th ed. 1889). Insofar as these cases relate to the alibi defense, they may have some relevance for problems such as those considered in *Ross* v. *United States,* 349 F. 2d 210 (C.A.D.C.), and similar cases, see *Nickens* v. *United States,* 323 F. 2d 808, 810, n. 2 (C.A.D.C.), certiorari denied, 379 U.S. 905, although the fact that in this country the prosecution is brought by the government rather than a private individual diminishes the threat of malicious prosecution or extortion, which are the main dangers to be avoided. In any event, the English cases cited by the *amicus* have no applicability to charges of the kind involved here, and certainly fall far short of reflecting any general common law rule in England prohibiting prosecutions after a lapse in time from the alleged offense to indictment.

As our original brief points out (pp. 15–17), the conception of a speedy trial at the time the Bill of Rights was adopted related to the period between formal accusation and trial. The *amicus* is quite correct to note (pp. 35–37) that then, as now, there were significant steps in the criminal process that might occur before indictment. But the issue in this case concerning the interpretation of the Sixth Amendment is not whether one can become "accused" before indictment; it is whether one becomes "accused" before any formal legal action of an accusatory nature is taken. In this connection, history leads to the same conclusion as language and sound judicial administration: that the Sixth Amendment does not

apply to the period before formal accusatory action has been taken.

Respectfully submitted.

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UNITED STATES v. MARION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 70–19. Argued November 8, 1971—Decided December 20, 1971

Appellees, claiming that the Government had known of the crimes with which they were charged, the circumstances of the crimes, and appellees' identities for over three years before they were indicted, moved to dismiss on the ground that the indictment was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses," and that the delay deprived them of rights to due process of law and a speedy trial as secured by the Fifth and Sixth Amendments. While asserting no specific prejudice, appellees contended that the indictment required memory of many specific acts and conversations occurring several years before and that the delay was due to the prosecutor's negligence or indifference in investigating the case and presenting it to the grand jury. The District Court, after a hearing, granted appellees' motion and dismissed the indictment for "lack of speedy prosecution," having found that the defense was "bound to have been seriously prejudiced" by the three-year delay. The Government took a direct appeal to this Court, which postponed consideration of the question of jurisdiction until the hearing on the merits. *Held:*

1. The motion to dismiss the indictment for lack of a speedy trial was in the nature of a confession and avoidance and constituted a motion in bar by appellees who had not been placed in jeopardy when the District Court entered its order of dismissal. That order was therefore directly appealable to this Court under former 18 U. S. C. § 3731. Pp. 311–312.

2. The Sixth Amendment's guarantee of a speedy trial is applicable only after a person has been "accused" of a crime, which in this case did not occur until appellees (who had not previously been arrested or otherwise charged) were indicted. Pp. 313–320.

3. The relevant statute of limitations provides a safeguard against possible prejudice resulting from pre-accusation delay, and here appellees were indicted within the applicable limitations period. Pp. 320–323.

4. Though the Due Process Clause may provide a basis for dismissing an indictment if the defense can show at trial that prosecutorial delay has prejudiced the right to a fair trial, appellees have not claimed or proved actual prejudice resulting from the delay and their due process claims are therefore speculative and premature. Pp. 325–326.

Reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the result, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 326.

Deputy Solicitor General Greenawalt argued the cause for the United States. With him on the briefs were *Solicitor General Griswold*, *Assistant Attorney General Wilson*, *Acting Assistant Attorney General Petersen*, *Beatrice Rosenberg*, and *Mervyn Hamburg*.

Thomas Penfield Jackson argued the cause for appellees and filed a brief for appellee Marion. *Benjamin Wright Cotten* filed a brief for appellee Cratch.

Alan Y. Cole and *Isaac N. Groner* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal requires us to decide whether dismissal of a federal indictment was constitutionally required by reason of a period of three years between the occurrence of the alleged criminal acts and the filing of the indictment.

On April 21, 1970, the two appellees were indicted and charged in 19 counts with operating a business known as Allied Enterprises, Inc., which was engaged in the business of selling and installing home improvements such as intercom sets, fire control devices, and burglary detection systems. Allegedly, the business was fraudu-

lently conducted and involved misrepresentations, alterations of documents, and deliberate nonperformance of contracts. The period covered by the indictment was March 15, 1965, to February 6, 1967; the earliest specific act alleged occurred on September 3, 1965, the latest on January 19, 1966.

On May 5, 1970, appellees filed a motion to dismiss the indictment "for failure to commence prosecution of the alleged offenses charged therein within such time as to afford [them their] rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States." No evidence was submitted, but from the motion itself and the arguments of counsel at the hearing on the motion, it appears that Allied Enterprises had been subject to a Federal Trade Commission cease-and-desist order on February 6, 1967, and that a series of articles appeared in the Washington Post in October 1967, reporting the results of that newspaper's investigation of practices employed by home improvement firms such as Allied. The articles also contained purported statements of the then United States Attorney for the District of Columbia describing his office's investigation of these firms and predicting that indictments would soon be forthcoming. Although the statements attributed to the United States Attorney did not mention Allied specifically, that company was mentioned in the course of the newspaper stories. In the summer of 1968, at the request of the United States Attorney's office, Allied delivered certain of its records to that office, and in an interview there appellee Marion discussed his conduct as an officer of Allied Enterprises. The grand jury that indicted appellees was not impaneled until September 1969, appellees were not informed of the grand jury's concern with them until March 1970, and the indictment was finally handed down in April.

Appellees moved to dismiss because the indictment was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses." They argued that the indictment required memory of many specific acts and conversations occurring several years before, and they contended that the delay was due to the negligence or indifference of the United States Attorney in investigating the case and presenting it to a grand jury. No specific prejudice was claimed or demonstrated. The District Court judge dismissed the indictment for "lack of speedy prosecution" at the conclusion of the hearing and remarked that since the Government must have become aware of the relevant facts in 1967, the defense of the case "is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968." [1]

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[1] App. 39. The court's oral decision consisted of the following statement: "It appears to the Court that the matters complained of occurred between March 1965 and January 1966. It further appears that these matters were known from early 1967 or a matter of common knowledge in late 1967. There appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968.

"The defendants have been indicted on 19 counts, each of which I believe carries a ten-year sentence, each of which is a separate, distinct transaction which would justify consecutive sentences, and by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.

"The Court, therefore, views that there has been a lack of speedy prosecution in this case, and will grant the motion to dismiss." *Ibid.*

The United States appeals directly to this Court pursuant to 18 U. S. C. § 3731 (1964 ed., Supp. V).[2] We postponed consideration of the question of jurisdiction until the hearing on the merits of the case.[3] We now hold that the Court has jurisdiction, and on the merits we reverse the judgment of the District Court.

I

Prior to its recent amendment, 18 U. S. C. § 3731 (1964 ed., Supp. V) authorized an appeal to this Court

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[2] The Criminal Appeals Act, 18 U. S. C. § 3731 (1964 ed., Supp. V), at the time of this appeal, provided in relevant part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

. . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The Omnibus Crime Control Act of 1970, § 14 (a), 84 Stat. 1890, amended the Criminal Appeals Act to read in pertinent part as follows:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

This amendment thus terminated the Court's appellate jurisdiction of Government appeals from district court judgments in federal criminal cases. Pending cases were not affected by the amendment, however, since subsection (b) of § 14 provides:

"The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section."

The Omnibus Crime Control Act of 1970 took effect on January 2, 1971; the appellees in this case were indicted on April 21, 1970.

[3] 401 U. S. 934 (1971).

by the United States when in any criminal case a district court sustained "a motion in bar, when the defendant has not been put in jeopardy." It is plain to us that the appeal of the United States is within the purview of this section. Appellees had not been placed in jeopardy when the District Court rendered its judgment. The trial judge based his ruling on undue delay prior to indictment, a matter that was beyond the power of the Government to cure since re-indictment would not have been permissible under such a ruling. The motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some extraneous factor, such as the running of the statute of limitations or the denial of a speedy trial. See *United States* v. *Weller*, 401 U. S. 254, 260 (1971). The motion rested on constitutional grounds exclusively, and neither the motion, the arguments of counsel, the Court's oral opinion, nor its judgment mentioned Rule 48 (b), Federal Rules of Criminal Procedure, as a ground for dismissal.[4] Our jurisdiction to hear this appeal has been satisfactorily established.

[4] Rule 48 (b) provides that: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint." In any event, it is doubtful that Rule 48 (b) applies in the circumstances of this case, where the indictment was the first formal act in the criminal prosecution of these appellees. See cases cited in n. 11, *infra*.

II

Appellees do not claim that the Sixth Amendment was violated by the two-month delay between the return of the indictment and its dismissal. Instead, they claim that their rights to a speedy trial were violated by the period of approximately three years between the end of the criminal scheme charged and the return of the indictment; it is argued that this delay is so substantial and inherently prejudicial that the Sixth Amendment required the dismissal of the indictment. In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an "accused," an event that occurred in this case only when the appellees were indicted on April 21, 1970.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch which is appropriate to assure him an early and proper disposition of the charges against him. "[T]he essential ingredient is orderly expedition and not mere speed." *Smith* v. *United States*, 360 U. S. 1, 10 (1959).

Our attention is called to nothing in the circumstances surrounding the adoption of the Amendment indicating

that it does not mean what it appears to say,[5] nor is there more than marginal support for the proposition that, at the time of the adoption of the Amendment, the prevailing rule was that prosecutions would not be permitted if there had been long delay in presenting a charge.[6] The framers could hardly have selected less

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[5] The history of the speedy trial provision is sparse and unilluminating with respect to the issue before us. See E. Heller, The Sixth Amendment to the Constitution of the United States 31–32, 34 (1951); R. Rutland, The Birth of the Bill of Rights, 1776–1791, p. 202 (1955); I. Brant, The Bill of Rights 223 (1965); Dumbauld, State Precedents for the Bill of Rights, 7 J. Pub. L. 323, 335 n. 91 (1958); Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 484 (1968).

[6] A single case which antedates the Bill of Rights, *Rex* v. *Robinson*, 1 Black. W. 541, 96 Eng. Rep. 313 (K. B. 1765), and three 19th century British cases, *Rex* v. *Marshall*, 13 East 322, 104 Eng. Rep. 394 (K. B. 1811); *Regina* v. *Hext*, 4 Jurist 339 (Q. B. 1840); *Regina* v. *Robins*, 1 Cox's C. C. 114 (Somerset Winter Assizes 1844), are cited for the proposition that the framers intended to protect against pre-indictment delay by enacting the Sixth Amendment. These cases fail to establish a definite rule that the Founders sought to constitutionalize, however, and the Government's argument concerning the history of the Sixth Amendment, while not dispositive, is more persuasive. Brief for the United States 15–18. The Government points out that the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, provided for "more speedy Relief of all Persons imprisoned for any such criminal or supposed criminal Matters" and required that persons jailed for felonies or treason be brought to trial upon their own motion within two terms of court or be discharged on bail. The Act does not allude to delay before arrest. Most of the States that ratified the Bill of Rights had either adopted the British Act or passed a similar law, *Petition of Provoo*, 17 F. R. D. 183, 197 n. 6 (Md.), aff'd *sub nom. United States* v. *Provoo*, 350 U. S. 857 (1955), and many of them had speedy trial provisions in their own constitutions which were modeled on the British Act. Article 8 of the Virginia Declaration of Rights, which may have been the model Madison used for the Sixth Amendment, Rutland, *supra*, n. 5, at 202, secured the right to a speedy trial in "criminal prosecutions" where "a man hath a

appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay. No opinions of this Court intimate support for appellees' thesis,[7] and the Courts of Appeals that have considered the question in constitutional terms have never reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where only pre-indictment delay was involved.[8]

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right to demand the cause and nature of his accusation." See generally Heller, *supra*, n. 5, at 23. Insofar as this meager evidence is probative at all, it seems to imply that the Sixth Amendment was designed to assure that those accused of crimes would have their trial without undue delay.

[7] This Court has interpreted the Sixth Amendment's speedy trial guarantee in only a small number of cases. See, *e. g.*, *Dickey* v. *Florida*, 398 U. S. 30 (1970); *Smith* v. *Hooey*, 393 U. S. 374 (1969); *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967); *United States* v. *Ewell*, 383 U. S. 116 (1966); *Pollard* v. *United States*, 352 U. S. 354 (1957); *United States* v. *Provoo*, *supra*, n. 6; *Beavers* v. *Haubert*, 198 U. S. 77 (1905). See also *Smith* v. *United States*, 360 U. S. 1, 10 (1959).

[8] Most courts of appeals have recognized the Sixth Amendment right to a speedy trial only after a prosecution has been formally initiated or have held that the sole safeguard against pre-indictment delay is the relevant statute of limitations: *United States* v. *Feinberg*, 383 F. 2d 60, 65 (CA2 1967); *Carlo* v. *United States*, 286 F. 2d 841, 846 (CA2), cert. denied, 366 U. S. 944 (1961); *Pitts* v. *North Carolina*, 395 F. 2d 182, 185 n. 3 (CA4 1968); *United States* v. *Durham*, 413 F. 2d 1003, 1004 (CA5 1969); *Kroll* v. *United States*, 433 F. 2d 1282, 1286 (CA5 1970), cert. denied, 402 U. S. 944 (1971); *United States* v. *Grayson*, 416 F. 2d 1073, 1076–1077 (CA5 1969); *United States* v. *Wilson*, 342 F. 2d 782, 783 (CA5), cert. denied, 382 U. S. 860 (1965); *Donnell* v. *United States*, 229 F. 2d 560, 567 (CA5 1956); *Harlow* v. *United States*, 301 F. 2d 361, 366 (CA5), cert. denied, 371 U. S. 814 (1962); *Bruce* v. *United States*, 351 F. 2d 318, 320 (CA5 1965), cert. denied, 384 U. S. 921 (1966); *Hoopengarner* v. *United States*, 270 F. 2d 465, 469 (CA6 1959); *United States* v. *Harris*, 412 F. 2d 471, 473 (CA6 1969); *Lothridge* v. *United States*, 441 F. 2d 919, 922 (CA6 1971); *Parker* v. *United States*, 252 F. 2d 680, 681